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January 29, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554

Re: CC Docket Nos.: 96-262; 94-1; 91-213; and 96-263

Dear Mr. Caton:

Pursuant to the Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry in the above captioned matter, enclosed please find an original and sixteen copies of the Comments of the Internet Access Coalition. Please date stamp the additional copy and return it with our messenger.

If you have any questions regarding this filing, please do not hesitate to call.

Sincerely,

Colleen Boothby

Colleen Boothby

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	CC Docket No. 96-263

COMMENTS OF THE INTERNET ACCESS COALITION

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January 29, 1997

SUMMARY

The Internet Access Coalition supports the Commission's comprehensive review of the access charge rules and urges the Commission to adopt its tentative conclusion that the Part 69 access charges should not be extended to Internet and Enhanced Service Providers ("ESPs/ISPs").

The Coalition agrees with the Commission and most industry observers that advances in network technology, and the potential for competition in the local exchange marketplace, require fundamental reform of Part 69. In the fourteen years since the Commission developed the current access charge regime, advances in network technologies and the prospect of emerging competition have eroded the connection between the Part 69 rate structure prescription and the Commission's original public policy objectives. Without substantial revision, the Commission cannot ensure that Part 69 serves the public policy objectives for which it was designed. With the passage of the 1996 Telecommunications Act, a fundamental overhaul of the access regime is even more critical.

As the Commission recognizes, the Part 69 access charge rules were developed for providers of circuit switched voice telephony services. Because Part 69 contains economically inefficient, non-cost-based rate structures, the Commission should not extend this regime to ESPs/ISPs. In particular, the Commission should reject the misleading claims of some Bell Operating Companies ("BOCs") that ESPs/ISPs must pay carrier access charges because they are causing significant network congestion without adequately compensating the

incumbent local exchange carriers ("ILECs"). The attached study by Economics and Technology, Inc. demonstrates that the handful of network congestion problems identified by the BOC cost studies are isolated and easily remedied. In addition, the study reveals that ILECs are reaping significant additional revenues from ESP/ISP services which more than compensate the ILECs for the use of their networks. Indeed, incumbent local exchange carrier ("ILEC") revenues resulting from the growth in Internet and other enhanced services have outstripped the ILECs' cost increases by a factor of at least *six to one*.

Extending carrier access charges to ESPs/ISPs, moreover, would constitute unlawful discrimination; would be inconsistent with the deregulatory policy embodied in the Telecommunications Act; would adversely affect competition in the thriving enhanced services market; and would present serious administrative difficulties. The proper regulatory response to the growth of the Internet and other enhanced services, as the Commission recognizes in the Notice, is to create incentives for the deployment of services and facilities to allow more efficient transport of data traffic.

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COMMENTS OF THE INTERNET ACCESS COALITION

INTRODUCTION

The Commission's Notice of Proposed Rulemaking[1] initiating its comprehensive access reform proceeding addresses two areas of critical importance to the information technology industry. First, the Commission proposes significant modifications of the current access charge system. Second, the Commission tentatively concludes that it should not extend the current carrier access charge regime to Internet and other Enhanced Service Providers ("ESPs/ISPs"). The Internet Access Coalition supports the Commission's comprehensive review of the access charge rules and urges the Commission to adopt its tentative conclusion.

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[1] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing*, Notice of Proposed Rulemaking, CC Docket Nos. 96-262, 94-1, 91-213, 96-263 (rel. Dec. 24, 1996) ("*Access Notice*").

As the Commission recognizes, the Part 69 access charge rules were developed for providers of circuit switched voice telephony services. Because Part 69 contains economically inefficient, non-cost-based rate structures, the Commission should not extend this regime to Internet and other Enhanced Service Providers ("ESPs/ISPs"). In particular, the Commission should reject the misleading claims of some Bell Operating Companies ("BOCs") that ESPs/ISPs must pay carrier access charges because they are causing significant network congestion without adequately compensating the incumbent local exchange carriers ("ILECs").

As discussed below, and in the attached study by Economics and Technology, Inc., the handful of network congestion problems identified by the BOC cost studies are isolated and easily remedied. In addition, the study reveals that ILECs are reaping significant additional revenues from ESP/ISP services which more than compensate the ILECs for the use of their networks. Indeed, incumbent local exchange carrier ("ILEC") revenues resulting from the growth in Internet and other enhanced services have outstripped the ILEC's cost increases by a factor of at least *six to one*.

Extending carrier access charges to ESPs/ISPs, moreover, would constitute unlawful discrimination; would be inconsistent with the Telecommunications Act; would adversely affect competition in the thriving enhanced service market; and would present serious administrative difficulties. The proper regulatory response to the growth of the Internet and other enhanced

services, as the Commission has recognized, is to "create incentives for the deployment of services and facilities to allow more efficient transport of data traffic."[2]

STATEMENT OF INTEREST

The Internet Access Coalition is a group of companies[3] and associations[4] dedicated to maintaining the affordability of consumer access to the Internet via analog, circuit-switched telephone lines and accelerating the availability of affordable, data-friendly consumer connections to the Internet. The Coalition's member companies and associations represent all aspects - hardware, software, and service - of the information technology industry. The Coalition was formed in the fall of 1996 to provide information on Internet access and technology to policy makers and the public. Accordingly, the Coalition is participating in this proceeding to focus public policy development on issues of particular interest to the information technology industry.

I. PART 69 REQUIRES FUNDAMENTAL REFORM TO ACCOMMODATE TECHNOLOGICAL ADVANCES, ENABLE COMPETITION, AND IMPLEMENT THE 1996 ACT

The Coalition agrees with the Commission and most industry observers that advances in network technology, and the potential for competition

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2 *Id.* at ¶ 313.

3 Internet Access Coalition member companies include America Online Incorporated, Apple Computer, Inc., Compaq Computer Corporation, CompuServe Incorporated, Digital Equipment Corporation, EarthLink Network, Inc., Eastman Kodak Company, GE Information Services, IBM Corporation, Intel Corporation, Microsoft Corporation, Netscape Communications Corporation, Novell, Inc., and Oracle Corporation.

4 Internet Access Coalition member associations include the American Electronics Association, the Business Software Alliance, the Consumer Electronics Manufacturers Assn., the Information Technology Association of America, the Information Technology Industry Council, and the Voice on the Net Coalition.

in the local exchange marketplace, required fundamental reform of Part 69, even before passage of the 1996 Act.[5] With the passage of the Act, a fundamental overhaul of the access regime is even more critical. Without substantial revision, the Commission cannot ensure that Part 69 serves the public policy objectives for which it was designed. And in some cases, the Commission must revamp Part 69 to ensure that it does *not* serve some of its original objectives, *e.g.*, the preservation of implicit subsidy flows which the 1996 Act seeks to eliminate.

The public policy goals of the original Part 69 rules were to: (1) create a level playing field for competitors in the interstate market by eliminating discrimination among interexchange carriers ("IXCs"); (2) discourage uneconomic bypass of local exchange services;[6] (3) introduce cost causative rate structures that encourage efficient use of the local network; and (4) preserve universal service, with its attendant implicit subsidy flows.[7]

In the fourteen years since the Commission developed the current access charge regime, advances in network technologies and the prospect of emerging competition have eroded the connection between the Part 69 rate structure prescription and the Commission's original public policy objectives.

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5 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. Section 151 *et. seq.*) ("the Act").

6 On the other hand, the rules were not intended to discourage *economic* bypass, which occurs, for example, when an ILEC's customers switch to a facility-based competitor.

7 *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1984) (*"Access Charge Order"*).

The Part 69 rate elements no longer reflect the way access customers use local networks. The Part 69 rate elements were designed to reflect the way IXCs use local networks; the rules established rate elements for each network element used by IXCs, given the then-current local network technologies and architectures. Local voice networks now use different facilities, have different architectures, and deliver different features and functions from those assumed by the Part 69. In addition, companies have developed alternative network services, such as SONET rings, packet networks, and packet-based data services, that differ markedly from traditional circuit-switched voice networks. Because local networks no longer operate as they did when the access rules were written, and because economically efficient access rules must reflect the way local networks operate and are used by customers, the rules must be updated, if for no other reason than to capture current access technologies, customer configurations, facilities, and services.

The existing rules are encrusted with ad hoc modifications. Individual carriers and the Commission have attempted to respond to the changes described in the preceding paragraph with a hodge-podge of *ad hoc* rate structures created pursuant to waivers of the rules.[8] These disparate services and rate structures have not been harmonized or integrated into the basic rate structures of Part 69 nor has the Commission been able to rationalize

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[8] *See Southwestern Bell Telephone Company Petition for Waiver of Part 69 of the Commission's Rules,* Memorandum Opinion and Order, 6 FCC Rcd 6095 (1991); *Ameritech Operating Companies, Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region,* Order, 11 FCC Rcd 7445 (1995); and *Access Notice,* at ¶ 299.

them with its public policy objectives based on the record developed in a comprehensive rulemaking proceeding.

Part 69 includes implicit subsidies that are inconsistent with the 1996 Act. The 1996 Act directs the FCC (in conjunction with a Federal-State Joint Board) to create explicit Universal Service subsidy mechanisms to replace the implicit subsidies buried in the Part 36 jurisdictional separations rules and the Part 69 access rules. The imminent creation of explicit subsidy elements in CC Docket No. 96-45[9] means, at a minimum, that access rate levels must be reduced (or re-initialized for Part 61 price caps carriers) to remove implicit universal service subsidies and prevent double recovery of costs by the ILECs. Therefore, the Coalition supports the Commission's proposal at ¶ 245 of the *Access Reform NPRM* to impose a downward exogenous cost adjustment to the PCIs of the price caps ILECs. For the same reason, while the Coalition supports non-traffic sensitive loop cost recovery through cost-based SLCs, the Coalition opposes increases in the SLCs for ISDN[10] and second residential lines that

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9 Federal-State Joint Board on Universal Service, CC Docket 96-45, Recommended Decisions, FCC 96J-3 (rel. Nov. 8, 1996).

10 Many members of the Coalition participated in *End User Common Line Charges*, CC Docket No. 95-72, Notice of Proposed Rulemaking, 10 FCC Rcd 8565 (1995) (*ISDN SLC NPRM*) and opposed the application of more than one or two SLCs to ISDN BRI and PRI services, respectively. (The *Access NPRM* incorporates these pleadings by reference.) The *Access NPRM* identifies no new facts or analysis which would justify a change in the position taken by Coalition members in their 95-72 pleadings. Higher SLCs would still suppress demand for ISDN and data services and the ILECs have submitted no auditable cost justification for imposing higher SLCs. The Coalition nevertheless supports a BRI SLC based on the 1.24:1 cost factor identified in the *Access NPRM* for the "rough justice" reasons outlined in the 95-72 pleadings and, for the same reasons, opposes a PRI SLC based on a 10.5:1 cost ratio. *See generally,* Comments of the Information Technology Industry Council (filed June 29, 1995) and Joint Reply Comments (filed July 14, 1995). Because "extreme nicety" in rate development is neither required, *Smith et al. v. Illinois Bell Telephone Co.*, 282 U.S. 133, 149 (1930), nor possible in the case of SLCs for ISDN lines, the Commission should apply the "rough justice" standard of 1 SLC/2 SLC described in the 95-72 pleadings.

would exceed the economic costs of such lines.[11] Above-cost SLCs for these services would simply perpetuate the system of implicit, non-cost-based subsidies to reduce end user SLCs below economically efficient levels.

Transitions to the economically efficient rate structures contemplated by Part 69 have been stymied. Under the original access regime, the carrier common line charge ("CCL") was a temporary mechanism pending a phase-in of cost-based SLCs for recovery of local loop costs. But economically efficient SLC increases have been blocked for a variety of non-economic reasons. Similarly, once the MFJ's "equal charge per unit of traffic" requirement expired, the Part 69 per minute Transport rate structures could have been updated to reflect the way Transport facilities are used by access customers. But the existing Transport rules retain per minute rate structures for facilities whose costs do not vary per minute. Therefore, the Coalition supports the proposals at paragraphs 80 to 122 of the *Access NPRM* to eliminate economically inefficient per minute Transport charges.

Rates based on embedded, historical costs are inconsistent with the forward-looking cost standard used in competitive markets. Unlike the

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[11] The Commission's proposal to increase the SLCs for second-line residential and multi-line business customers above the costs of such lines is a step backward in policy. The *Access NPRM* asserts without analysis or support that such a rate structure would be consistent with the way costs are incurred, a dubious proposition given that second residential lines avoid many of the non-recurring costs for installation and billing required for initial lines and customer accounts while multi-line business customers already pay higher business rates for basic service. *And see* Lee L. Selwyn & Joseph W. Laszlo, The Effect of Internet Use on The Nation's Telephone Network, Appendix A, Second Lines Attributable to On-Line Service Use (prepared for the Internet Access Coalition, Jan. 22, 1997) (*"ETI Study"*), Attached hereto. By pegging rate differences to the nature of the customer rather than differences in the cost of service, the Commission's proposal would create an implicit subsidy, unsustainable in the face of competitive entry and inconsistent with the statutory preference for explicit universal service subsidies.

traditional rate of return regulatory mechanisms in place when Part 69 was developed, competitive markets do not guarantee participants that they will recover their embedded historical costs. As the Commission has recognized,[12] competitive markets drive prices to forward-looking economic costs. Therefore, the ILECs who have asserted that local exchange markets are sufficiently competitive to be de-regulated should be the first to support long-run incremental cost ("LRIC") standards to establish (or, under price caps, to re-initialize) their rates, so that their rate levels will reflect the same cost standard that their competitors use. Accordingly, the Coalition supports (and individual Coalition members have historically supported) the Commission's proposals in ¶¶ 161, 220 - 227, and 241 - 259 that would wean carriers away from rate levels based on embedded historical costs and towards the more economically efficient levels established by a forward-looking, LRIC standard.

The Coalition supports the Commission's efforts in Sections IV, V, and VI of the *Access NPRM* to develop a plan for de-regulating local exchange markets when they become competitive. Coalition members operate in some of the most competitive markets in the nation's economy and, once the ILECs do too, Coalition members will no doubt be offered better rates and services for local exchange services the best incentive for the ILECs to deploy modern

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[12] *See generally,* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*"Interconnection Order"*), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996), *petition for review pending and partial stay granted, sub no.* Iowa Utilities Board et al. v. FCC, No 96-3321 and consolidated cases (8th Cir., Oct. 15, 1996), *partial stay lifted in part,* Iowa Utilities Board et al. v. FCC, No. 96-3321 and consolidated cases (8th Cir., Nov. 1, 1996).

network transmission technologies is the possibility that a competitor will do so first and capture the ILECs' customer base.

Until competition develops, however, the Commission must impose appropriate regulation not only to protect the ILECs' customers, but to protect potential new entrants from anti-competitive practices by those carriers. In particular, although the *Access NPRM* discussed at length the regulatory changes required to give ILECs pricing flexibility to respond to competition, the *NPRM* gave considerably less attention to the regulatory changes required to ensure that competitors have economically efficient opportunities to enter the market (*e.g.*, unbundling the access elements into sub-elements). The Commission must focus on both sides of the de-regulation issue -- granting ILECs the pricing flexibility to respond to competition *and* constraining ILEC efforts to protect their existing monopolies from new entrants.

II. THE COMMISSION SHOULD ADOPT ITS TENTATIVE CONCLUSION THAT VOICE TELEPHONY CARRIER ACCESS CHARGES SHOULD NOT BE EXTENDED TO INTERNET AND OTHER ENHANCED SERVICE PROVIDERS

In the Notice, the Commission tentatively concludes that carrier access charges should not be extended to ESPs/ISPs.[13] Rather, as the Notice correctly recognizes, the proper regulatory response to the growth of the Internet and other enhanced services is to "create incentives for the deployment of services and facilities to allow more efficient transport of data traffic."[14]

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13 *See* Notice at ¶ 288.

14 *Id.* at ¶ 313.

A. The Access Charge Regime Was Designed For Interexchange Carriers; There is No Justification for *Extending* it to ESPs/ISPs

During the last decade, various communications common carriers have repeatedly insisted that the Commission should eliminate the so-called "ESP exemption" from access charges. These parties have fundamentally mischaracterized the issue. The simple fact is that there is not -- and has never been -- an "ESP exemption". Rather, as the Notice correctly states, access charges are part of a "regulatory system designed for circuit-switched inter-exchange voice telephony."[15] Because ESPs are *users* of telecommunications services -- not interexchange carriers -- the Commission has repeatedly recognized that they are not required to pay carrier access charges.[16]

Even a cursory review of the Commission's rationale for the Part 69 rules demonstrates that carrier access charges were never intended for ESPs. The Commission adopted the access charge regime in 1983, in response to two specific developments: the emergence of competition in the interstate, interexchange

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[15] *Id.* at ¶ 288. The Commission's Part 69 rules expressly differentiate between carriers and end-users, and do not require end-users to pay carrier access charges. *Compare* 47 C.F.R. §§ 69.4(a) and 69.5(a) (specifying "end user charges") *with id.* at §§ 69.4(b) & 69.5(b) (specifying "carrier's carrier charges"). *See Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 (1987) ("Under our rules, enhanced service providers are treated as 'end users'" and, therefore, are "not [required to] pay interstate access charges.").

[16] The Commission has made clear that ESPs are not "exempt" from contributing to the cost of the local network. Rather, they are subject to a *different* regulatory regime. As explained in the *Access Charge Reconsideration Order*, the Commission "impos[ed] surcharges in lieu of carrier's carrier access charges on private lines used by enhanced service providers." *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 763 (1983). The flat-rate private line surcharge -- which is paid by all private line end-users -- remains in effect.

services market and the break-up of the Bell System monopoly.[17] From the start, the access charge regime was designed to reflect the concerns of providers of local exchange and interexchange voice telephony. For example, the access charge rules embody a deliberate decision to perpetuate the historic practice of over-pricing long-distance service to generate subsidies that could be used to lower the price of local telephone service.[18] In its early years, the access charge regime also imposed different charges on AT&T and its competitors, to reflect the fact that AT&T alone was able to provide its voice customers with "one-plus" dialing, while customers of competing IXCs were required to dial a seven digit access code.[19] Even today, the principal interstate switched access service -- Feature Group D -- includes "equal access" long distance dialing, trunk-side signalling, and other voice-oriented features that ESP/ISPs neither want nor need.

In light of this history, the relevant question is not whether to "eliminate" the "ESP exemption" from the access charge regime. Rather, as the Notice recognizes, the issue that must be resolved in this proceeding is whether the Commission should "*extend* this regime to an additional class of users."[20] The Notice tentatively concludes that, because the current access system "includes non-

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17 *See Access Charge Order*, 93 F.C.C.2d at 344-54. The access charge regime was the direct outgrowth of the so-called "ENFIA Agreement," which was designed to resolve disputes between the pre-divestiture Bell System and the emerging competitive long-distance carriers regarding the rates that these new entrants would pay to originate and terminate calls over the Bell System's network. *See generally Exchange Network Facilities for Interstate Access*, 90 F.C.C.2d 6 (1982), *aff'd in part, rev'd in part sub nom. MCI Telecommunications Corp. V. FCC*, 712 F.2d 517 (D.C. Cir. 1983).

18 *Access Charge Order*, 93 F.C.C.2d at 253.

19 *See Access Charge Reconsideration Order*, 97 F.C.C. 2d at 728.

20 *Notice* at ¶ 288 (emphasis added).

cost-based rates and inefficient rate structures, "there is "no reason" to do so.[21] Instead, the Commission proposes to retain the current regime, in which "ESPs may purchase services from incumbent LECs under the same intrastate tariffs available to [other] end users."[22] The Commission should adopt its tentative conclusion.[23]

There is nothing discriminatory about requiring interexchange carriers to pay carrier access charges, while not imposing a similar requirement on ESPs/ISPs. The Commission frequently has adopted different rules for carriers and non-carriers. For example, under the Section 251 Interconnection Order, competitive LECs may obtain network elements from incumbent LECs, and also may collocate equipment in the ILECs' central offices, while ESPs/ISPs do not have these rights.[24]

B. The BOC "Studies" Do Not Provide a Rationale For the Imposition of Carrier Access Charges on ESPs/ISPs

Four of the Bell Operating Companies ("BOCs") -- U S West, Pacific Telesis, NYNEX, and Bell Atlantic -- and the BOCs' research affiliate, Bellcore, have filed studies with the Commission asserting that the growth of the Internet is causing significant congestion, which threatens the reliability of the public switched telephone network ("PSTN").[25] These BOCs claim that, to alleviate this congestion,

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21 *Id.*

22 *Id.* at ¶ 285.

23 *See Interconnection Order* at ¶¶ 581, 995.

24 *Id.* at ¶ 268.

25 "Report of Bell Atlantic on Internet Traffic" (June 28, 1996); "Pacific Bell ESP Impact Study" (July 2, 1996); Letter From NYNEX to James Schlichting, Chief, Competitive Pricing Division, Federal

they have had to deploy expensive new circuit switching equipment. They further contend that, under the current regulatory regime, they have no means of recovering the costs of these outlays from ESPs/ISPs. The "solution" to this alleged "problem," the BOCs insist, is to require ESPs/ISPs to pay carrier access charges. The Commission should reject this argument.

Contrary to the claims made in the BOC studies, ESPs/ISPs are not causing significant network congestion. As explained in the attached analysis prepared by Economics and Technology, Inc. ("ETI"), the BOC studies are not based on any comprehensive review (or even any statistically representative sample) of actual traffic levels. These studies, ETI demonstrates, were based exclusively on "isolated, worst-case situations" – namely 127 central offices (out of a total of nearly 24,000 nationwide) that serve one or more relatively large on-line service providers.[26] For example, Pacific Telesis "bases its claim of a congestion problem upon experience in *a single central office*, located in Silicon Valley, where Internet, ESP, and telecommuting patterns are in all probability far above average."[27] As a result, the studies fail "to give an accurate picture of the . . . impact of data traffic on the BOC networks as a whole."[28]

Communications Commission (July 10, 1996); "U S West Communications ESP Network Study" (June 28, 1996); "Impacts of Internet Traffic on LEC Networks and Switching Systems," Bellcore (1996).

26 *Id.* at 19-20.

27 *Id.* at 20.

28 *Id.* at 22.

As ETI demonstrates, the fact that a tiny number of central offices are experiencing significant increases in traffic hardly demonstrates that the growth of data services is having an adverse effect on the network as a whole. To the contrary, based on an analysis of the minutes of use attributed to the Internet and other on-line services, ETI finds that "end user and ISP/ESP access lines combined appear to impose *less than proportionate demand* on aggregate PSTN capacity."[29]

To the extent that increased data traffic may have contributed to switch congestion problems in a relatively small number of central offices, the ETI study demonstrates that these problems can be resolved with the technologically simple solutions that the ILECs routinely use when end-users other than ESPs/ISPs create similar congestion anomalies. As ETI explains, network congestion may arise because many ESPs/ISPs access the network using analog business lines that connect to "switch components that are designed to handle primarily low-use individual residential and small business access line customers."[30] Many problems caused by the use of such access arrangements could be eliminated using standard solutions developed for non-data lines, such as distributing more evenly lines with similar traffic patterns among multiple switch entry points.

ETI further notes that *all* of the LEC switch congestion problems could be alleviated if ESPs/ISPs used access arrangements (such as T-1 based ISDN Primary Rate Interface Service) that connect at the trunk side, rather than the line

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29 *Id.* at 29 (emphasis in original).

30 *Id.* at 3.

side, of the switch. According to ETI, such arrangements actually would be less expensive for the BOCs to provide than an equivalent solution using analog business lines.[31] The BOCs, however, have deterred many ESPs/ISPs from using digital T-1 lines and other trunk side connections by offering these arrangements only at premium rates, which far exceed the price of an equivalent solution using analog business lines.[32] In addition, new technologies can easily separate Internet and other enhanced services traffic from ordinary voice traffic and route it "around" the LEC switch to a packet network (based on X.25, frame relay, or ATM), thereby eliminating any congestion problem.

The BOCs' claims that data services are getting a "free ride" when they use local network facilities is unfounded. ETI demonstrates that the BOC studies have completely ignored the substantial streams of revenue that are flowing to the local exchange carriers as a result of the growth of the Internet and other on-line services. According to ETI, the BOC studies do not accurately account for the compensation that the BOCs receive directly from ESPs/ISPs. These studies, ETI explains, assume that all ESPs/ISPs provide their services using low-cost business lines. In fact, many ESPs/ISPs use digital T-1 lines or other detailed access arrangements that, as noted above, are provided at premium prices.[33] The BOC studies also ignore the fact that many ESPs/ISPs also subscribe to a variety of

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31 *Id.* at 16.

32 ETI reports that a hunt group of 24 analog voice lines is priced between 22% and 65% less than the equivalent trunk-side connection. *See id.* at 15.

33 Notwithstanding the BOCs' claims to the contrary, ESPs that use business lines are charged rates that are fully compensatory.

"vertical services," such as call forwarding or direct inward dialing, for which the BOCs also charge a premium.

Direct payments from ESPs/ISPs, ETI further explains, are not the only source of data-service-related revenue. The cost of moving traffic across the PSTN is primarily recovered through charges imposed on the *caller*.[34] As ETI notes, calls to ESPs/ISPs generate substantial income for the BOCs in the form of local fees imposed on users. In the case of business lines, these charges generally are usage-sensitive. In addition, the growth of the Internet and other on-line services has stimulated demand for residential and business "second lines." ETI estimates that in 1995 approximately six million residential second lines were used primarily or exclusively for on-line services, and that the LEC revenue from these lines exceeded $1.4 billion.[35] This revenue, ETI concludes, exceeds the Bellcore studies' inflated estimate of the cost of accommodating the growth of the Internet by a factor of *six to one*.[36]

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[34] There is nothing remarkable about the fact that the subscriber, rather than the recipient, of a data transmission would pay a majority of the cost of the transmission. As ETI explains, the use of "sent paid" pricing is the cornerstone of the postal system, in which the recipient of a letter typically makes *no* contribution to the cost of delivery. *See* ETI Study at 23.

[35] *Id.* at 25. ETI derived this figure by analyzing the growth in both residential second lines and Internet/enhanced services between 1990 and 1996. As ETI found, the percentage of households that subscribed to second lines increased from less than 3% before 1990 to nearly 16% in 1996. This growth closely parallels the increase in the percentage of households that subscribed to Internet or other on-line services during the same period. *See* ETI Study at 25-28. While ETI assumed that the majority of this growth was attributable to the addition of second lines for voice traffic, it conservatively estimated that approximately 44% of all second lines are now used primarily or exclusively for Internet or enhanced service access. *See* ETI Table 3 and App. A. This number is fairly close to a recent Bell Atlantic estimate -- not based on a rigorous analysis -- that 25 to 30 percent of second-line use is Internet related. R.J. O'Connor, "Net's Need for Phone System Fix Sparks Battle Over Whose To Pay," *San Jose Mercury News,* WWW.SJMercury.Com. (Jan. 25, 1996).

[36] *See* ETI Study at 26.

Rather than imposing uncompensated costs on the BOCs, the growth of the Internet and other on-line services has provided the BOCs with an important new source of income. This revenue is more than sufficient to allow the BOCs to upgrade the existing circuit switched networks to accommodate increased data traffic. Indeed, this revenue would enable the BOCs to deploy new technologies that could better accommodate data traffic.

C. The Imposition of Carrier Access Charges on ESPs/ISPs Would Raise Significant Legal, Policy, and Administrative Concerns

As the Coalition has demonstrated, there are no affirmative policy justifications for extending the access charge regime to ESPs/ISPs. To the contrary, as described in the following paragraphs, doing so would raise significant legal, policy, and administrative concerns.

1. Unlawful discrimination

Requiring ESPs/ISPs to pay carrier access charges would be unlawful. Section 202(a) of the Communications Act of 1934 prohibits "unjust or unreasonable discrimination in charges . . . for . . . like communication service."[37] To determine whether services are "like," the Commission and the courts focus on the nature of the services being provided, not the identity of the user or the purpose for which the service is used.[38]

The ETI study provides a comprehensive description of the way in which ESPs/ISPs use the public switched network to receive data transmissions

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37 47 U.S.C. § 202(a).

38 *See Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993).

from their subscribers.[39] These service providers, ETI explains, use the local network in precisely the same way as many large business users. ESPs/ISPs, moreover, often have "traffic volume that is comparable" [40] to that of business users. Because ESPs use the local network in the same manner as many other large business users, it would be unlawfully discriminatory to require them -- alone among all end users -- to pay per-minute carrier access charges.

2. Imposition of Regulation

Ordering ESPs to purchase access services at federally tariffed rates would be entirely inconsistent with the"pro-competitive, de-regulatory national policy framework" established by the Telecommunications Act of 1996.[41] Under the Commission's current rules, ESPs/ISPs -- like all end-users -- are permitted to choose either state or federally tariffed access arrangements.[42] In contrast, interexchange carriers are *required* to pay federal access charges. Although these charges ostensibly are intended to recover the cost of local exchange facilities used to originate or terminate interstate traffic, their primary effect is not cost recovery. Rather, they generate substantial subsidies designed to achieve a range of federal regulatory objectives. Consequently, *requiring* ESPs/ISPs to pay carrier access charges would needlessly impose a subsidy-laden federal regulatory regime

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39 ETI Study at 5-9.

40 *Id.* at 18.

41 *See* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. at 113 (1996).

42 Although ESPs/ISPs may purchase interstate access services from LECs, they are not required to do so.

designed for voice telephony providers on non-regulated ESPs/ISPs. This would directly contradict the policy, adopted by Congress as part of the Telecommunications Act, favoring the "preserv[ation of] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." [43]

3. Adverse competitive consequences

Imposition of access charges on ESPs/ISPs would have a significant adverse effect on competition in the now-vibrant market for these services. As the ETI study explains, because packet technology eliminates the need for dedicated circuits through the use of dynamic routing, the duration of a communication over the Internet or other packet network has virtually no impact on its cost.[44] If non-carrier-affiliated ESPs/ISPs were required to pay per-minute charges to LECs, however, they would not be able to reap the efficiency benefits that packet technology can provide. Rather, they would be obligated to pass these per-minute costs on to their customers. This would significantly decrease consumer demand for these companies' offerings.

Imposition of per-minute access charge would *not* have the same adverse effects on carrier-affiliated Internet and enhanced service providers' operations. This is the result of a fundamental difference between the incumbent LECs and their competitors. If a LEC-affiliated Internet or enhanced service provider

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43 The Act § 509, (codified at 47 U.S.C. § 230 (b)(2)).

44 *See* ETI Study at 1 n.2.

were to make access charges payments, it would simply be making an intra-corporate transaction from one part of its business to another. As a result, a LEC-affiliated ESP/ISP would not have to pass on these costs to its customers. The end result would be to place non-affiliated ESPs/ISPs at an insurmountable competitive disadvantage. This, plainly, would not serve the public interest.

4. Administrative infeasibility

In addition to being inappropriate as a matter of law and policy, the imposition of federal carrier access charges on traffic delivered to ESPs/ISPs over the local network also would be unworkable. Because ESPs/ISPs use the local network in precisely the same manner as many other large business users that operate private networks, it would be all but impossible to determine whether a particular end-user is an ESP/ISP.[45] If the Commission were to extend carrier access charges to ESPs/ISPs, however, it would be necessary to distinguish ESPs/ISPs from these other users. This inevitably would entangle the Commission in fact-specific determinations regarding the specific services that a given entity provides over its network.[46]

Even if a given user were determined to be an ESP/ISP, further resources would have to be expended to establish which portion of the traffic

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[45] Indeed, even the BOCs acknowledge that they have no way to accurately assess whether a given end-user is an ESP/ISP. *See* "Report of Bell Atlantic on Internet Traffic" at 4 (explaining that "ISPs submit orders for local services . . . through our business offices in similar fashion to *any other end user* business customer, therefore their facilities cannot be separately identified for collection of usage data") (emphasis added)).

[46] For example, the Commission would need to determine whether a particular entity was using its network entirely for internal purposes or whether it was providing enhanced services to third parties. Particular problems would occur in situations in which an entity operated a "mixed use" network, which was designed to meet its internal needs, but which also was used to provide services to third parties.